APPEAL NO: 03-21-00053-CV

In the Court of Appeals for Third District of Texas

Mary Louise Serafine,
PLAINTIFF-APPELLANT,

v.

Karin Crump, in her individual and official capacities as Presiding Judge of the 250th Civil District Court of Travis County, Texas; and Melissa Goodwin, in her individual and official capacities as Justice of the Third Court of Appeals at Austin, Texas; David Puryear and Bob Pemberton, in their individual capacities as former justices of the Third Court of Appeals at Austin, Texas,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE 345TH JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

APPELLEE JUSTICES' BRIEF

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Oral Argument Requested

IDENTITY OF PARTIES AND COUNSEL

The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 38.1(a) of the Texas Rules of Appellate Procedure have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. Parties:

Plaintiff-Appellant: Mary Louise Serafine

Defendants-Appellees: Judge Karin Crump
Justice Bob Pemberton
Justice David Puryear
Justice Goodwin

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INTRODUCTION

For nine years, Mary Louise Serafine has not stopped. She has not stopped harassing her neighbors through a lawsuit about a property line. She has not stopped harassing Judge Crump for daring to make rulings against her in that case. She has not stopped harassing Justices Puryear, Pemberton and Goodwin for affirming those rulings and the jury's verdict.

After numerous attempts to malign the careers, reputations and the credibility of these State Judge Appellees through unending pursuit of frivolous claims, Mary Louise Serafine has ultimately been declared a vexatious litigant. There is no basis to overturn the trial court's decision on this score because Chapter 11 protects from the exact actions Serafine has not stopped, and will not stop, taking.

STATEMENT OF THE CASE

Plaintiff Mary Louise Serafine first filed suit against Justices Pemberton, Puryear and Goodwin and Judge Karin Crump in the United States District Court, Western District, Austin Division, on November 28, 2017. *See* Serafine v. Crump, et. al, Civil Case No. 1:17-cv-01123-LY (W.D. Tex. 2017) (Dkt No. 5). The suit was dismissed by Judge Lee Yeakel for lack of subject matter jurisdiction. *Id*. at Dkt Nos. 72-73.

While on appeal of that decision, Serafine re-filed her exact same suit against Defendants in the 345th Judicial District of Travis County entitled *Mary Louise Serafine v. Karin Crump, et. al*, Cause No. D-1-GN-19-002601. *See* Dkt. Nos. 1-2. Although Appellees attempted to remove the case to federal court, the suit was ultimately remanded to the 345th Judicial District, Travis County. C.R.298. Once there, Appellee Justices immediately, and timely, filed a motion to declare Serafine vexatious pursuant to Chapter 11 of the Civil Practice and Remedies Code; Appellee Crump filed the same. C.R. 152; C.R.218. Between December 2019, the month the motion was filed, and November 2020, Serafine made no attempts to respond to the motions or move her case further in any manner.

Upon Appellees setting of their Motions for a hearing, Serafine made every attempt to delay a decision on Appellees' motions. She filed a motion to change venue, in the venue she chose to file her suit in. C.R.446. She objected to holding the vexatious litigant hearing over video conference. C.R.466. She tried to dismiss the entirety of the vexatious litigant proceedings under the Texas Citizen's Participation Act ("TCPA"). C.R.483. She supplemented her petition. C.R.589. She moved to strike exhibits to the vexatious litigant motions accusing Appellees of fabricating evidence. C.R.617. She moved to stay the suit entirely and filed a writ of mandamus in this Court, asking it to order the trial court to hear her multiple motions before

deciding Appellees' motions. C.R.644-80; *In re Serafine*, 03-20-00611-CV, 2020 WL 7757363 (Tex. App.—Austin Dec. 29, 2020, no pet.) (denying mandamus). She filed a supplement to her TCPA motion. C.R.870. She attempted to subpoena Appellees, and their court staff, two days before the vexatious litigant hearing by emailing their counsel. C.R.926-42. She filed a writ of mandamus, this time in the Texas Supreme Court. C.R.949; *In Re Mary Louise Serafine*, 2020 WL 8022198 (Tex. 2020) (denying mandamus). And, finally, she filed suit in federal court two days before the hearing challenging the constitutionality of Chapter 11 and seeking to enjoin the trial court from proceeding with the vexatious litigant hearing. *Serafine v. Abbott, et al.*, Case No. 1:20-cv-1249 (W.D. Tex. 2020) (Dkt. Nos. 1-2).

In spite of these dilatory pleadings, a hearing on Appellees' Motions was held on December 30, 2021. R.R.1. After hearing argument and reviewing the evidence, the trial court granted Appellees' motions. The trial court issued a final order pursuant to Texas Civil Practice & Remedies Code § 11.051 that Serafine was a vexatious litigant and ordered her to furnish security in the amount of $5,000 to proceed with her suit. C.R.1415. The trial court then issued a second order under Texas Civil Practice & Remedies Code § 11.101 prohibiting Serafine from filing new litigation without first obtaining permission from a local administrative judge. C.R.1413.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Justices respectfully request oral argument given that the issues in this case present questions regarding the interpretation of statutory language that has received different, and sometimes incongruous, opinions from various appellate courts. Because Chapter 11 serves important purposes to the State and defendants, oral argument would aid in determining the proper interpretation of the statute.

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court lacks jurisdiction to hear Serafine's appeal of the trial court's order under Section 11.051 declaring her vexatious and ordering her to furnish security.

Issue 2: Whether the trial court abused its discretion in declaring Serafine to be a vexatious litigant pursuant to Section 11.101.

Issue 3: Whether this Court lacks jurisdiction over Serafine's remaining arguments.

STATEMENT OF FACTS

Serafine filed this, her second suit against Appellee Justices, on May 10, 2019. C.R.7. As she did in federal court, Serafine sued Appellee Justices under 42 U.S.C. § 1983 for "act[tions] in their judicial capacity[ies]" when they presiding over an appeal of jury verdict in favor of Serafine's neighbors, who she sued over land disputes. C.R.9 (Original Petition) at ¶5. Serafine alleged past actions taken by Appellee Justices in issuing that opinion violated her rights and entitled her to prospective relief. C.R.10 (Original Petition) at ¶¶9-13, 18-22.

Appellee Justices moved to have Serafine declared a vexatious litigant based upon the likely lack of success of her petition and the fact that Serafine had commenced, prosecuted or maintained numerous litigations over the past seven years. C.R. 152; C.R.218. These litigations include:

> **(1)** *Serafine v Blunt, et. al.*, Civ. No. 17-0597 (Texas Supreme Court Feb. 16, 2018) (Motion for Rehearing denied) (*See* Exhibit A (C.R.166-68));
> **(2)** *Serafine v Blunt, et. al.*, Civ. No. 17-0597 (Texas Supreme Court Dec. 1, 2017) (Petition for Review denied) (*See* Exhibit B (C.R.169-70));
> **(3)** *Serafine v. Branaman*, No. 1:11-cv-01018 (W.D. Tex Sept. 24, 2014) (final judgment against Serafine issuing take nothing judgment) (Exhibit C (C.R.171-73))
> **(4)** *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016) (affirming lower court's take nothing judgment against Serafine for her prior-restraint claim) (*See* Exhibit D (C.R.174-97));
> **(5)** *Serafine v. Crump*, No. 17-cv-1123 (W.D. Tex July 30, 2018) (order and final judgment dismissing *Serafine I*) (Exhibit E (C.R.198-203))
> **(6)** *Serafine v. Blunt*, 03-16-00131-CV, 2017 WL 2224528 (Tex. App.—Austin May 19, 2017, pet. denied), reh′g denied (July 21, 2017) (affirming jury verdict against Serafine) (Exhibit F (C.R.205-13))
> **(7)** *In re Serafine*, 03-14-00775-CV, 2014 WL 6891889 (Tex. App.—Austin Dec. 5, 2014, no pet.) (denying Serafine's petition for writ of mandamus) (Exhibit G (C.R.214-15))
> **(8)** *In re Mary Louise Serafine*, No. 19-50183 (5th Cir. 2019) (denying Serafine's petition for writ of mandamus) (Exhibit H (C.R.216-17))
> **(9)** *Serafine v. Crump,* 800 Fed. Appx. 234 (5th Cir. 2020) (dismissing appeal) (*See* Exhibit I (C.R.974-78))
> **(10)** *Serafine v. Crump*, 20-192, 2020 WL 6121586, at *1 (U.S. Oct. 19, 2020) (denying petition for writ of certiorari) (*See* Exhibit J (C.R.979-81)).

Each one of these adverse decisions against Serafine were rendered upon a pro se filing made by Serafine herself. R.R.34:10-37:3.

Based on these adversely-decided litigations, as well as the probability of a lack of success on the merits, the trial court correctly found Serafine to be a vexatious litigant. C.R.1413-16.

SUMMARY OF THE ARGUMENT

This Court should hold that it does not have jurisdiction to hear Serafine's appeal of the trial court's order under Section 11.051 because such an order is neither a final judgment nor an appealable interlocutory order. As to the trial court's order under Section 11.101, this Court should affirm the trial court's finding that Serafine is a vexatious litigant because she has had more than 5 cases determined adversely to her in the past seven years and she is unlikely to prevail in her claims against Appellee Justices. Finally, this Court lacks jurisdiction on interlocutory appeal to hear Serafine's remaining complaints about the trial court's decisions.

STANDARD OF REVIEW

An appellate court should review a trial court's declaration of a vexatious litigant under an abuse of discretion standard. *In re Douglas*, 333 S.W.3d 273, 282–83 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Douglas v. Am. Title Co.*, 196 S.W.3d 876, 879 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE §§ 11.054–.056. The test for an abuse of discretion is whether the court acted arbitrarily or unreasonably and without reference to any

guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439, 443 (Tex. 1984); *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124, 126 (Tex. 1939).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER SERAFINE'S APPEAL OF THE TRIAL COURT'S ORDER UNDER SECTION 11.051 THAT SHE IS VEXATIOUS AND THAT SHE FURNISH $5,000 IN SECURITY PRIOR TO PROCEEDING IN THE PRESENT CASE.

This Court does not have jurisdiction to consider any appeal by Serafine of the trial court's order under Texas Civil Practice and Remedies Code § 11.051. *Nunu v. Risk*, 567 S.W.3d 462, 466 (Tex. App.—Houston [14th Dist.] 2019) ("It is well-established that no statute authorizes an interlocutory appeal from an order declaring a person to be a vexatious litigant and requiring the person to post security."). Generally, only final decisions of trial courts are appealable. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see* TEX. CIV. PRAC. & REM. CODE § 51.012 (final judgment of district and county courts). Some appeals from particular types of interlocutory orders have also been authorized by the Legislature. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 51.014. Therefore, appeals can generally be taken only from final judgments and appealable interlocutory orders. *Lehmann*, 39 S.W.3d at 195. If an order is not either a final judgment, or one from which the

Legislature has authorized appeal, this Court has no authority to review the court's ruling. *Id.*

There are two types of relief orders that may be issued related to a vexatious litigant motion. The first is available under Section 11.051 and provides that a defendant may, within ninety days of filing an original answer, seek an order determining the plaintiff to be a vexatious litigant and requiring her to furnish security. TEX. CIV. PRAC. & REM. CODE § 11.051. The second order may be issued under Section 11.101, which allows a court (on the motion of a party or on its own motion), upon finding a person to be a vexatious litigant, to prohibit that person from filing new litigation. *Id.* at § 11.101. While courts have held that orders under Section 11.101 can be immediately appealable as interlocutory orders, there is no authority to suggest an order under Section 11.051 is final or appealable. *See Morgan v. Talley*, 597 S.W.3d 607, 609 (Tex. App.—El Paso 2020, no pet.) (citations omitted) ("[T]here is no statute explicitly allowing for the interlocutory appeal of a vexatious litigant order requiring payment of a bond to continue litigating a particular case. As such, we cannot reach the propriety of that trial court order in this procedural posture."); *see also Almanza v. Keller*, 345 S.W.3d 442, 443 (Tex. App.–Waco 2011, no pet.) ("[T]here is no statutory right of an interlocutory appeal of a vexatious litigant order or the related order requiring security.").

It appears from Serafine's brief that she is appealing the Court's order under both Section 11.051 and Section 11.101. *See* Appellant's First Supplemental Brief (App. Br.) at 74[1]. To the extent it is the former, this Court does not have jurisdiction to hear her appeal given than there is no final judgment in this case.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLARING SERAFINE TO BE A VEXATIOUS LITIGANT PURSUANT TO SECTION 11.101.

Chapter 11 of the Texas Civil Practice & Remedies Code permits a court, on the motion of a party or on its own motion, to declare a litigant to be vexatious. TEX. CIV. PRAC. & REM. CODE § 11.101. There are two criteria. First, the court must find that there is no reasonable likelihood that the plaintiff will succeed on her claims against the defendants. TEX. CIV. PRAC. & REM. CODE § 11.054. Second, the court must find that, in the past seven years, the plaintiff has "commenced, prosecuted or maintained at least five litigations asa pro se litigant" that were "finally determined adversely to the plaintiff." *Id.* at § 11.054(1).

This Court should affirm the trial court's order under Section 11.101. Serafine has commenced more than five litigations in the past seven years that were

[1] The page numbers cited to in Appellant's First Supplemental Brief match the pagination of the brief as Appellant has numbered it.

determined adversely to her. Moreover, Serafine's suit lacks any chance of success on the merits.

A. Serafine has Commenced, Prosecuted or Maintained at Least Five "Litigations That Were "Finally, Adversely Determined."

The trial court considered Serafine's substantial litigious history and properly found that in the past seven years, Serafine had commenced, prosecuted, or maintained at least five lawsuits that were finally determined adversely to her. TEX. CIV. PRAC. & REM. CODE § 11.054(1); C.R.166-217; C.R.974-81. Evidence of Serafine's previous litigation, in the form of final judgments and appellate opinions, were filed with the trial court, and thus support such a finding. C.R.166-217; C.R.974-81. Serafine's qualifying litigations include:

> **(1)** *Serafine v Blunt, et. al.*, Civ. No. 17-0597 (Texas Supreme Court Feb. 16, 2018) (Motion for Rehearing denied) (Exhibit A (C.R.166-68));
> **(2)** *Serafine v Blunt, et. al.*, Civ. No. 17-0597 (Texas Supreme Court Dec. 1, 2017) (Petition for Review denied) (Exhibit B (C.R.169-70));
> **(3)** *Serafine v. Branaman*, No. 1:11-cv-01018 (W.D. Tex Sept. 24, 2014) (final judgment against Serafine issuing take nothing judgment) (Exhibit C (C.R.171-73))
> **(4)** *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016) (affirming lower court's take nothing judgment against Serafine for her prior-restraint claim) (Exhibit D (C.R.174-97));
> **(5)** *Serafine v. Crump*, No. 17-cv-1123 (W.D. Tex July 30, 2018) (order and final judgment dismissing *Serafine I*) (Exhibit E (C.R.198-203))
> **(6)** *Serafine v. Blunt*, 03-16-00131-CV, 2017 WL 2224528 (Tex. App.—Austin May 19, 2017, pet. denied), reh'g denied (July 21, 2017) (affirming jury verdict against Serafine) (Exhibit F (C.R.205-13))

(7) *In re Serafine*, 03-14-00775-CV, 2014 WL 6891889 (Tex. App.—Austin Dec. 5, 2014, no pet.) (denying Serafine's petition for writ of mandamus) (Exhibit G (C.R.214-15))
(8) *In re Mary Louise Serafine*, No. 19-50183 (5th Cir. 2019) (denying Serafine's petition for writ of mandamus) (Exhibit H (C.R.216-17))
(9) *Serafine v. Crump,* 800 Fed. Appx. 234 (5th Cir. 2020) (dismissing appeal) (Exhibit I (C.R.974-78))
(10) *Serafine v. Crump*, 20-192, 2020 WL 6121586, at *1 (U.S. Oct. 19, 2020) (denying petition for writ of certiorari) (Exhibit J (C.R.979-81))[2]

On appeal, Serafine asks this Court to count none of these litigations. C.R.53-54. She reasons that (1) it is an abuse of discretion to consider failed litigations beyond the statute's seven-year timeframe (C.R.55-59); (2) Chapter 11 does not apply to lawyers or, at the very least, lawyers who enlist another lawyer as "co-counsel" in their litigations (C.R.60-62); (3) the only "litigations" that should be counted are those that are "a whole case" (*Id.* at 31, 33); (4) that a decision cannot be one that was "determined adversely" to her so long as she did not lose at least one issue argued (*Id.* at 35-36); (5) denials of mandamus relief do not count, at all (*Id.* at 36-37).[3]

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[2] During the vexatious litigant proceedings, but before the trial court issued written orders, Serafine continued to commence litigations and receive adverse determinations. *In re Serafine*, 03-20-00611-CV, 2020 WL 7757363 (Tex. App.—Austin Dec. 29, 2020, no pet.) (denying mandamus); *In Re Mary Louise Serafine*, 2020 WL 8022198 (Tex. 2020) (denying mandamus); *Serafine v. Abbott, et al.*, Case No. 1:20-cv-1249 (W.D. Tex. 2020) (Dkt. No. 4) (denying preliminary injunction request).

[3] Serafine also appears to argue that Appellees' vexatious litigant motions, and the hearing, were untimely. Since this argument is so clearly contrary to what the statute says, it does not appear to require further rebuttal. TEX. CIV. PRAC. & REM. CODE § 11.054 ("the defendant may, on or before the 90th day after the date the defendant files the original answer... move the court for an order...determining that the plaintiff is a vexatious litigant; and...requiring the plaintiff to furnish

These claims are contrary to case law, do not follow a plain language reading of Chapter 11 and otherwise lack merit. For the reasons discussed below[4], this Court should affirm the trial court's order for Serafine's failure to meet the abuse of discretion standard.

1. *The trial court did not abuse its discretion in considering Serafine's 2020 losses in federal court.*

The trial court was well within its discretion to consider Serafine's losses before the Fifth Circuit and the United States Supreme Court in 2020. C.R.974-81 (Exhibits I and J to Appellee Justices' Motion). The plain language of Chapter 11 permits a trial court, while conducting a hearing on a vexatious litigant motion, to "consider *any* evidence material to the ground of the motion, including...written or oral evidence." TEX. CIV. PRAC. & REM. CODE § 11.053. The statute does not limit the court to considering only the motions filed, or evidence attached therein. *See id.* Thus, Serafine has not demonstrated the trial court "acted arbitrarily or unreasonably and without reference to any guiding rules and principles" in considering Exhibits I or J. *In re Douglas*, 333 S.W.3d at 283.

security."); *see also id.* at § 11.053 ("On receipt of a motion under Section 11.051, the court shall, after notice to all parties, conduct a hearing to determine whether to grant the motion.").

[4] Although Appellee Justices assert this Court lacks jurisdiction to reverse the trial court's order made pursuant to Section 11.051, they include reference to, and argument in favor of affirming, that order in the event this Court disagrees.

Moreover, as to an order made pursuant to Section 11.101, the statute dictates that "[a] court may, *on its own motion*...enter an order prohibiting a person from filing, pro se, a new litigation in a court...without permission of the appropriate local administrative judge." TEX. CIV. PRAC. & REM. CODE § 11.101(a) (emphasis added). In *Douglas*, the Fourteenth Court of Appeals pointed to this very language to hold that a trial court may, at any time, "raise the vexatious litigant issue sua sponte." *Douglas*, 333 S.W.3d at 283. The Court found such a holding was reasonable to serve the "primary purpose of the statute," which is to allow courts the "statutory (as well as an inherent) right...to control their own dockets." *Id*.

Given the *Douglas* reasoning, the trial court did not abuse its discretion in requiring the seven-year timeframe to be triggered at the time of the hearing on defenses' motions in this instance. As the Fourteenth Court held in another *Douglas* case only two years later, "the trial court's decision would not constitute an abuse of discretion, *provided that Douglas was still afforded proper notice and hearing of the trial court's intent*." *Douglas v. Redmond*, 14-12-00259-CV, 2012 WL 5921200, at *6 (Tex. App.—Houston [14th Dist.] Nov. 27, 2012, pet. denied) (emphasis added). Because Serafine was afforded notice and a hearing on the use of Exhibits I and J to make a determination under Chapter 11, the same result should render here.

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2. *Serafine is Not Absolved of a History of Harassing Litigations Because She Was a Lawyer or Had "Co-Counsel" at the Time of Filing.*

Serafine is incorrect in her assertion that "CPRC § 11.002 bars applying the statute to a represented attorney." App. Br. at 58. The "Plaintiff" for purposes of the vexatious litigant statute is "an individual who commences or maintains a litigation pro se." TEX. CIV. PRAC. & REM. CODE § 11.001(5). Section 11.002(a) very clearly states that, indeed, the vexatious litigant statute "does not apply to an attorney licensed to practice law in this state *unless the attorney proceeds pro se*." TEX. CIV. PRAC. & REM. CODE § 11.002(a) (emphasis added).

For every litigation used to prove the second prong of the vexatious litigant statute, Serafine was representing herself pro se. This was explained, and never rebutted, at length at the vexatious litigant hearing.[5] R.R.35:2-37:3. Serafine's arguments that she was represented by counsel at some points of her litigation or that she named a fellow attorney as "co-counsel" during her pro se representation[6] does

[5] The pro se briefs can be found at the following citations or hyperlinks: **Ex. A:** Serafine v. Blunt, Case No. 17-0597 (Tex. 2018) (Motion for Rehearing filed 1/10/2018); **Ex. B:** *Serafine v. Blunt*, 2017 WL 4862847 (Tex. 2017); **Ex. C:** *Serafine v. Branaman*, A-11-CV-1018-LY, 2014 WL 12570445 (W.D. Tex. Sept. 24, 2014), rev'd and remanded, 810 F.3d 354 (5th Cir. 2016); **Ex. D:** *Serafine v. Branaman*, Case No. 14-51151 (5th Cir. 2014) at Doc. No. 512929930; **Ex. E:** *Serafine v. Crump*, 2019 WL 1503758 (C.A.5); **Ex. F:** *Serafine v. Blunt*, 2016 WL 5720934 (Tex.App.-Austin); **Ex. G:** *In re Serafine*, 03-14-00775-CV, 2014 WL 6891889 (Tex. App.—Austin Dec. 5, 2014, no pet.); **Ex. H:** *In re Mary Louise Serafine*, Case No. 19-50183 (5th Cir. 2019) at Doc. No. 514883848; **Ex. I:** *Serafine v. Crump*, 2019 WL 1493539 (C.A.5); **Ex. J:** *Serafine v. Crump*, 2020 WL 4905203 (U.S.).

[6] The record is devoid of any evidence that Mr. Vinson has contributed to any of Serafine's litigations outside consenting to his name being placed on the pleadings as co-counsel.

not absolve her of the vexatious litigant statute's application. *1901 NW 28th St. Tr. v. Lillian Wilson, LLC*, 535 S.W.3d 96, 101–02 (Tex. App.—Fort Worth 2017, no pet.) ("Plaintiff was originally represented by counsel, but counsel withdrew, and [Plaintiff] did not seek to dismiss the suit...This is a section 11.054(1)(A) qualifying litigation."); *Drake v. Andrews*, 294 S.W.3d 370, 375 (Tex. App.—Dallas 2009, pet. denied) ("To interpret the statute in such a way as to immunize Drake from its effect, simply because Drake was briefly represented by counsel, would be to thwart the statute's purpose.").

To permit Serafine to file as many harassing, frivolous suits as she desires, and avoid being declared a vexatious litigant so long as she places another attorney's name below hers on the filings, does not serve the purpose of Chapter 11.

3. Serafine is Not Absolved of a History of Harassing Litigations Because She Pursues the Same Claims Over and Over Again.

This Court should decline to follow Serafine's rationale that her years-long lawsuits against various people should not be counted as litigation in each of the courts into which she forces various defendants. The plain language of Chapter 11 states that "'[l]itigation' means a civil action *commenced*, *maintained*, or *pending* in *any* state or federal court." TEX. CIV. PRAC. & REM. CODE § 11.001(2). State courts include district and appellate courts. Federal Courts include district and appellate courts. Civil actions are able to be commenced, maintained or pending in both

district and appellate courts. *Retzlaff v. GoAmerica Communications Corp.*, 356 S.W.3d 689, 699 (Tex. App.—El Paso 2011, no pet.)

This plain language of Chapter 11 has been analyzed by the Eighth Court of Appeals in *Retzlaff*, 356 S.W.3d at 699. There, the Court addressed the very same argument Serafine makes to this Court – "appeals should not count because litigation is commenced in a trial court, not an appellate court" – and stated that this position "ignores the broad language used in the vexatious litigant statutes." *Id.* The Court recognized that "a person who files a notice of appeal is maintaining litigation." *Id.* Thus, it held, "[t]he language of these statutes *plainly encompasses* appeals." *Id.* The Court found the language also encompassed writs of mandamus because "a person who seeks mandamus relief commences a civil action in the appellate court." *Id.* at 700.

Other courts have ruled consistent with the *Retzlaff* court.[7] *In re Bowling*, 05-21-00423-CV, 2021 WL 2943922, at *1 (Tex. App.—Dallas July 6, 2021, no pet. h.) ("petition for writ of mandamus is a civil action to which the vexatious litigant statute applies"); *Restrepo v. All. Riggers & Constructors, Ltd.*, 538 S.W.3d 724, 751

[7] Serafine claims this Court has not followed this reasoning by "counting [a] trial court's judgment and appeals from judgment as one 'litigation'" in *Leonard v. Abbott*, 171 S.W.3d 451, 459–60 (Tex. App.—Austin 2005, pet. denied). App. Br. 34. *Leonard* did no such thing. This Court said nothing about that being the way to determine "litigations" under the statute, instead, the plaintiffs in that case simply had plenty of lawsuit to choose from that the issue never arose.

(Tex. App.—El Paso 2017, no pet.) ("appeals and original proceedings filed by a litigant are included in the number of proceedings to be counted against a litigant.").

In keeping with the plain language of the statute, courts may count litigations in both state and federal courts. *See, supra*. Courts may count litigations at both the trial and appellate levels. Nothing in the statute or relevant case law suggests "litigation" is to be interpreted in the way it is by preclusion doctrines or in other areas of law. This is clear by the fact that Chapter 11 provides its own definition of "litigation." TEX. CIV. PRAC. & REM. CODE § 11.001(2). Therefore, it was not an abuse of discretion for the trial court to interpret that definition by counting Serafine's three separate losses in *Serafine v Blunt, et. al.*, Civ. No. 17-0597, a mandamus loss in *In re Serafine*, 03-14-00775-CV, another mandamus loss in *In re Mary Louise Serafine*, No. 19-50183 and her three losses in her first attempt to sue these Appellees in *Serafine v. Crump*, No. 17-cv-1123.

Any argument that these litigations, or the *Serafine v. Branaman*[8] litigations, were not finally determined adversely to Serafine lacks merit. The statute requires only "five litigations," not "five *whole* litigations" or "five *complete* litigations."[9]

[8] The trial court decided not to count the *Branaman* cases as part of its vexatious litigant determinations. R.R.156:19-21. However, for the reasons discuss in this brief, they should be counted as qualifying litigations.

[9] What Serafine asks is for this Court to read the simple word "litigation" as the way it is used in issue preclusion doctrines. App. Br. 33-35. But there is no authority for such a notion. As discussed

Litigation can be commenced in trial court; and a verdict in that court is a "final judgment." TEX. CIV. PRAC. & REM. CODE 51.012; TEX. R. CIV. PRO. 301. Litigation can be commenced in appellate courts, whereby the issuance of an opinion is the final ruling, even if it can be appealed to a higher court. *Goad v. Zuehl Airport Flying Cmty. Owners Ass'n, Inc.*, 04-11-00293-CV, 2012 WL 1865529, at *4 (Tex. App.—San Antonio May 23, 2012, no pet.) (Stating litigation is final under Chapter 11 where there is a "final, *appealable* order").

Similarly, the statute requires only that the litigation be "determined adversely." TEX. CIV. PRAC. & REM. CODE § 11.054. Although the case law on what constitutes an "adverse determination" is sparse, Black's Law Dictionary defines "adverse" as "[h]aving an opposing or contrary...position." ADVERSE, Black's Law Dictionary (11th ed. 2019). Although Serafine asks this Court, again, to add words into Chapter 11 so that Appellees are required to show a "*complete* adverse determination," the plain language indicates that a determination need only be decided against that party's interest or position in order to qualify.[10] All of the litigations utilized to meet Appellees' burden were determined adversely to Serafine

herein, courts interpret the language in Chapter 11 considering only the plain meaning and without adding in additional words.

[10] Serafine also appears to suggest that a decision that the court lacks jurisdiction over her suit may not have been an adverse determination. App. Br. at 54. This is contrary to this Court's prior ruling on this issue. *See Leonard*, 171 S.W.3d at 459–60 (counting several litigations dismissed for lack of subject matter jurisdiction in meeting Chapter 11's numerosity requirement.)

given that they were decided, at the very least in part[11], against Serafine's interests. C.R.166-217, 974-81.

B. Serafine Is Not Reasonably Likely to Prevail in Her Suit Against Appellees.

1. *Appellee Justices Are Entitled to Sovereign Immunity.*

Under Texas law, a suit against a government employee in his official capacity is usually a suit against his government employer. *Franka v. Velasquez*, 332 S.W.3d 367, 382–83 (Tex. 2011). A state official sued in his official capacity may invoke the sovereign immunity from suit held by the governmental unit itself because the suit is not one against the official personally; the real party in interest is the governmental unit. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). A state official sued in his official capacity therefore may challenge the trial court's jurisdiction on the grounds of sovereign immunity by filing a plea to the jurisdiction, and the trial court's ruling on the plea is within the scope of Section 51.014(a)(8). *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (Tex. 2007).

Appellee Justices are, or were, judicial officers of the Third Court of Appeals, which is an agency of the State of Texas and a "governmental unit" within the meaning of Section 101.001(3)(A) of the Texas Civil Practice and Remedies Code.

[11] Serafine makes this argument – that a partially favorable ruling equates to an entirely non-adverse determination – only as to Exhibits D and F in her brief. App. Br. at 53-54.

TEX. CIV. PRAC. & REM. CODE § 101.001(3)(A). Serafine's suit against Appellee Justices in their official capacities as Justices on the Third Court of Appeals is effectively against the governmental unit, and Appellee Justices may assert the governmental unit's immunities from suit in a plea to the jurisdiction. *See Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (Tex. 2007). A section 1983 suit against Appellee Justices in their official capacities is barred by sovereign immunity and by the Eleventh Amendment. *Alden v. Maine*, 527 U.S. 706, 754 (1999); *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 195 (Tex. 2010); *see* C.R.7-57; C.R.589-611.

2. *Appellee Justices are Entitled to Judicial Immunity.*

The Supreme Court has recognized absolute immunity from suit for judges acting in the performance of their judicial duties. *See Nixon v. Fitzgerald*, 457 U.S. 731, 745–46 (1982). While there is some authority for the idea that judicial immunity does not prohibit a court from granting prospective judicial relief against a judicial officer to prevent him from exceeding his authority in the future, Serafine does not ask for any relief that can truly be considered "prospective." *Twilligear v. Carrell*, 148 S.W.3d 502, 504–05 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

When determining whether a complaint seeks relief properly characterized as prospective, the primary inquiry is whether the plaintiff states facts sufficient to

show an ongoing violation of federal law. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 288 (1997); *see also Calton v. Schiller*, 498 S.W.3d 247, 252 (Tex. App.—Texarkana 2016, pet. denied) ("An injunction is not available to 'prevent commission of wrongs not imminently threatened."). Accordingly, "[the Fifth Circuit] and others have often held that plaintiffs lack standing to seek prospective relief against judges because the likelihood of future encounters is speculative." *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1286 (5th Cir. 1992); *see also Hailey v. Glaser*, 06-12-00065-CV, 2012 WL 5872869, at *3 (Tex. App.—Texarkana Nov. 21, 2012, no pet.) (stating plaintiff had not sought true prospective relief to overcome judges' immunity from suit because "an injunction is not available to 'prevent commission of wrongs not imminently threatened'" and a declaratory judgment that the judges' past acts violated the law was a request for retrospective relief.)

Serafine has never stated facts that indicate she is suffering an ongoing violation of her federal rights as a result of Appellee Justices' actions.[12] *See generally* C.R.7-57; C.R.589-611. Instead, Serafine makes clear that her rights were violated in the past when Appellee Justices issued their opinion, back in May 2017, affirming the jury verdict against her and that such violations may one day occur again. C.R.7-

[12] Serafine's suit against her neighbors is *still* ongoing at the time of filing this brief and she has not yet appeared in front of any of the Appellees since originally filing this suit.

57 at ¶¶55-58, 64, 72, 74, 77, 81-82; *Serafine*, 2017 WL 2224528 at *8. The mere speculation that Serafine *may* appear before Appellee Justices is not so immediate a threat to constitute a proper request for prospective relief, particularly given that Appellee Justices Puryear and Pemberton are no longer on the bench and Appellee Justice Goodwin has not presided over Serafine's lawsuits since, nor is there evidence she will. *Soc'y of Separationists, Inc.*, 959 F.2d at 1286 ("[the Fifth Circuit] and others have often held that plaintiffs lack standing to seek prospective relief against judges because the likelihood of future encounters is speculative.").

Any speculation as to whether Serafine may possibly, one day, appear in front of one of the Appellee Justices is insufficient to establish a right to prospective relief. To obtain injunctive relief, a plaintiff must be "*likely* to suffer future injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (emphasis added). The threat of future injury to the plaintiff "must be both *real* and *immediate*, not conjectural or hypothetical." *Id.* at 102 (emphasis added). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *Bauer*, 341 F.3d at 358 (citing *Lyons*, 461 U.S. at 95-96).

Simply put, the true focus of Serafine's lawsuit centers on the allegation that Appellee Justices' past rulings were illegal. Thus, Serafine is unable to overcome

Appellee Justices entitlement to judicial immunity by re-classifying the retroactive relief she seeks as prospective.

3. *Serafine lacks standing to seek injunctive relief under Section 1983.*

Under 42 U.S.C. § 1983, injunctive relief may not be sought against a judicial officer for an act or omission taken in such officer's judicial capacity "unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. When the question is whether another court should enjoin a pending state-court proceeding, "even irreparable injury is insufficient unless it is 'both great and immediate.'" *Bauer*, 341 F.3d at 357 (citing *Younger*, 401 U.S. at 45).

Serafine asserts she is entitled to injunctive relief under both possible methods: that declaratory relief was unavailable to her in state court and Appellees' judicial oaths constitute declaratory decrees that were violated. C.R.23 at ¶¶31. The only basis for Serafine's contention that declaratory relief was unavailable to her during her state court proceedings is because "[Appellees] herein were not parties in the state court action; they were the adjudicators of that action." *Id*. Serafine does not explain how Appellee Justices' positions deprived her of available declaratory relief during her state court proceedings. Certainly, there does not appear to be any case law out of any court that supports a holding that declaratory relief is *per se* unavailable where the defendant is a judge. *James v. Tobolowski*, 517 Fed. Appx. 285,

286 (5th Cir. 2013); *Catanach v. Thomson*, 718 Fed. Appx. 595, 599 (10th Cir. 2017), cert. denied, 138 S. Ct. 1991 (2018); *Azubuko v. Royal*, 443 F.3d 302, 304 (3d Cir. 2006). And, generally, there are a number of ways a party can seek declaratory relief over a presiding judge whose ruling(s) they find to be biased or fraudulent. *See, e.g.,* TEX. R. APP. PRO. 16.3.

Serafine's claim that she is entitled to injunctive relief because Appellee Justices' judicial oath constitutes a declaratory decree that was violated is similarly meritless. *See* C.R.24 at ¶31. The federal court has already considered, and rejected, this argument in *Serafine I*. *See Serafine I*, Civil Case No. 1:17-cv-01123-LY (ECF No. 30 at p.5) ("As nearly all judges take some oath, and nearly all judicial behavior that could be alleged to violate Constitutional due process rights could also be argued to violate such oaths, Serafine's position would render this provision of § 1983 entirely superfluous."). Serafine presents no new facts that would justify the trial court deciding her suit in a manner contrary to that of the federal court.

4. *Serafine lacks standing to seek declaratory relief.*

In Texas, declaratory relief is controlled by the Uniform Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 37.001 et seq. The Uniform Declaratory Judgments Act provides that "a court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further

relief is or could be claimed." TEX. CIV. PRAC. & REM. CODE § 37.003(a). This act is a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power permitting the rendition of advisory opinions. *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994).

A declaratory judgment is meant to "define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act." *Haggard v. Bank of the Ozarks, Inc.*, 547 Fed. Appx. 616, 620 (5th Cir. 2013). "[S]ome danger that the harm would be repeated must exist in order to warrant declaratory relief," and, here, that danger has not been shown. *Pembroke v. Wood County, Tex.*, 981 F.2d 225, 228 (5th Cir. 1993).

Serafine seeks relief in the form of a declaration that her constitutional rights *were* violated by Appellee Justices. C.R.56-57; C.R.610. Nothing in her prayer for relief or the entirety of the amended petition, in general, suggests that Appellee Justices' complained-of conduct continued after their issued opinion in 2017, is currently happening or will be repeated in the future. *See generally id.* Thus, any "declaration that [Appellee Justices'] past conduct violated [Plaintiff's] constitutional rights ... would be nothing more than a gratuitous comment without any force or effect." *Johnson v. Onion*, 761 F.2d 224, 225 (5th Cir. 1985); *see also P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (stating that

the Eleventh Amendment "does not permit judgments against state officers declaring that they violated federal law in the past.").

III. This Court Lacks Jurisdiction Over Serafine's Remaining, Meritless Arguments.

Serafine makes several other arguments in her Appellant's brief regarding the trial court's decisions: (1) not to issue findings of fact or conclusions of law; (2) not to hear Serafine's motion to dismiss under the Texas Citizen's Participation Act (TCPA) prior to the vexatious litigant motion; and (3) not to hear Serafine's motion for a change of venue prior to the vexatious litigant motion. App. Br. at 14-22. This Court does not have jurisdiction to hear an interlocutory appeal of these issues. Interlocutory orders are not immediately appealable unless explicitly allowed for by statute. *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011).

Serafine points to no statutory authority that permits her to appeal a denial of her request to issue findings of fact or conclusions of law on a vexatious litigant decision, which is the only actual order issued of Serafine's three complaints. Even if there were, "the vexatious litigant statute does not require written findings of fact and conclusions of law," therefore, it was not error for the trial court to decide not to issue any. *Willms v. Americas Tire Co., Inc.*, 190 S.W.3d 796, 802 (Tex. App.—Dallas 2006, pet. denied), opinion supplemented on denial of reh'g (May 5, 2006).

Similarly, there is no statutory authorization for this Court to review the trial court's decision to adhere to Chapter 11's stay requirement and defer ruling on Serafine's TCPA and venue motions until after Appellees' vexatious litigant motions. Even if there were, this Court has already held that it is not an abuse of discretion for the trial court to declare a plaintiff vexatious even where there are "various motions pending, including motions to transfer venue [...], [a] motion to compel, and [a] plea to the jurisdiction." *Drake v. Willing*, 03-14-00665-CV, 2015 WL 5515903, at *4 (Tex. App.—Austin Sept. 16, 2015, no pet.). No reversal is required, therefore, where there is no jurisdiction to review these decisions and, regardless, the trial court acted consistent with this Court's jurisprudence.

CONCLUSION

Appellee Justices respectfully request that this Court affirm the trial court's order made pursuant to Texas Civil Practice and Remedies Code § 11.101. Appellee Justices further request that this Court find that it lacks jurisdiction to review (1) the trial court's order made pursuant to Texas Civil Practice and Remedies Code § 11.051; and (2) any other decisions Serafine takes issue with in her appeal.

Respectfully Submitted.

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NOTICE OF ELECTRONIC FILING

I, **COURTNEY CORBELLO**, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing, a true and correct copy of the foregoing in accordance with the File and Serve Texas system of 3rd Court of Appeals on August 20, 2021.

/s/ Courtney Corbello
COURTNEY CORBELLO
Assistant Attorney General

CERTIFICATE OF SERVICE

I, **COURTNEY CORBELLO**, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing has been served via email, through File and Serve Texas, on August 20, 2021, to all counsel of record

/s/ Courtney Corbello
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I certify that this computer-generated document, accounting for Rule 9.4(i)(1)'s inclusions and exclusions, is 6,775 words, as calculated by Microsoft Word 2016, the computer program used to prepare this document.

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